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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 GEORGE CHEN,

15 Plaintiff,

16 v.

17 UNITED WAY OF THE BAY AREA,

18 Defendant.

CASE NO. C 07-02785 WHA

**PLAINTIFF'S OPPOSITION TO
PETITION TO COMPEL ARBITRATION**

Date: August 16, 2007
Time: 8:00 a.m.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff GEORGE CHEN respectfully submits this Opposition to Defendant UNITED WAY OF THE BAY AREA (UWBA)'s Petition to Compel Arbitration of Plaintiff's Claim for Libel. Although both state and federal law favor enforcement of valid contracts for arbitration, both state and federal law require valid, enforceable contracts. The question of the enforceability of the contract is a question of state law. The federal court, in a removal case, follows state law, including the intermediate appellate courts of the state.

The arbitration agreement in question requires Plaintiff, but not Defendant, to submit all claims to arbitration. It shortens the statute of limitations for Plaintiff, but not Defendant. It denies all discovery for Plaintiff's claims, but not Defendant's. It is so clearly unenforceable under California law that even Defendant concedes the point with respect to Plaintiff's claim for violation of public policy.

Defendant argues, however, that the clause is not unenforceable with respect to Plaintiff's claim for libel. Defendant ignores the relevant law and the facts as follows:

- Defendant's arguments as to why the arbitration provision is not procedurally unconscionable have been considered and rejected by California courts. Defendant ignores this law.
- Defendant makes no serious argument that its one-sided agreement is not substantively unconscionable. It does not bother to discuss how its blatantly one-sided provisions, square with the relevant case law.
- California law holds that if an arbitration clause is unenforceable with respect to one claim but arguably enforceable as to another, the clause should not be enforced with respect to either claim under these circumstances. Defendant ignores these cases as well.

When the Court considers the law that governs this issue, and the facts that Defendant glosses over, it is clear that Defendant's Petition has no merit and should be denied.

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1 **I. FACTS**

2 In April of 2001, George Chen reached an agreement to join UWBA as its Chief Financial
3 Officer. Declaration of George Chen in Opposition to Petition to Compel Arbitration (“Chen
4 Decl.”) ¶ 2. At the time, all of the “back office” functions of United Way had been “spun off” to a
5 supposedly independent entity known as PipeVine, Inc. Chen Decl. ¶ 4. The Chief Financial
6 Officer of UWBA had no staff, not even a secretary, and no authority. Chen Decl. ¶ 8. He could
7 not even write a check. Chen Decl. ¶ 8. All functions, including accounting, payroll, and human
8 resources were spun off to this supposedly independent company which, in theory, would attract
9 other customers that would use its “back office” expertise, thus lowering overhead for UWBA.
10 Chen Decl. ¶ 4.

11 On his first day of work, Mr. Chen was given some documents to sign. Chen Decl. ¶ 3.
12 One of them was an “application for employment,” even though he was already hired. Another
13 was a letter agreement, ostensibly dated May 9, 2001, but which was presented to him on May 16,
14 2001 after he was hired as part of his “hiring package.” Chen Decl. ¶ 5. The letter was a form
15 letter presented by PipeVine personnel who had no authority to make changes in it. Chen Decl. ¶
16 5, 6. This letter contained a provision stating:

17 By signing this agreement you agree that any and all disputes or controversies
18 that you may have which arise out of, or as a result of employment hereunder,
19 including claims of discrimination based upon sex, age, national origin, disability,
20 race, or any other basis shall be resolved by final and binding arbitration as the
21 sole and exclusive remedy. This agreement shall be governed by the Federal
22 Arbitration Act (9 U.S.C. 1, et seq.) and the Arbitration must be initiated by your
23 notice to The United Way within six months of the first occurrence of the events
24 giving rise to the dispute. Such notice shall be in writing, delivered to the
25 President, and shall contain a statement setting forth the remedy sought and the
26 nature of the dispute, including the specifics of your claim. The sole neutral
27 arbitrator shall be selected as provided in Rule 12 of the American Arbitration
28 Association Voluntary Labor Arbitration Rules, as amended January 1, 1984.

Rules 4-6, 10, 11, 16-24, and 26-46 of those same Rules shall apply to and govern the proceedings. Expenses of the arbitration, other than your attorney's fees, if any, or the expenses of producing witnesses or evidence for you, shall be paid by The United Way up to a maximum amount of \$1,000.00. Exh. B to Declaration of Eric McDonnell.

The rules referred to in the provision quoted above were not attached. Chen Decl. ¶ 6.

Plaintiff immediately noted that PipeVine, the purported "spin-off" operation, had questionable financial controls and accounting practices. Compl. ¶ 9. He reported these shortcomings to his superiors, but UWBA refused to take action, because of longstanding business ties to the management of the purported spin-off. Compl. ¶ 9. Plaintiff also identified numerous examples of improper financial management and reporting by UWBA. Compl. ¶ 10. Plaintiff identified misreporting of revenues received, which would make it appear that UWBA's total revenues were significantly higher than they actually were, based on sound accounting principles. Compl. ¶ 12. UWBA sought to omit items of overhead that had to be reported, according to sound principles. Compl. ¶ 10. The purpose of this misreporting was to mislead the public on an issue of importance: Was UWBA using the money entrusted to it efficiently. Inflating total revenue and underreporting overhead both tended to conceal UWBA's extremely high overhead, which showed the public that far too many of its dollars would not reach the intended recipients, but would instead stop at UWBA's offices. Chen Decl. ¶ 7.

Plaintiff's actions created friction with his superiors. Chen Decl. ¶ 10. Plaintiff persisted in demanding that UWBA management face up to the shortcomings of PipeVine, acting with increasing urgency as the shortcomings of PipeVine became more apparent to him, despite no support or acknowledgement of his superiors of any problems. Chen Decl. ¶ 10. When UWBA's financial reporting was not accurate, Plaintiff would not sign off on it. Compl. ¶ 9. In case after case, Plaintiff was able to show his superiors that their actions would not meet statutory requirements or sound accounting practices. Chen Decl. ¶ 11. Plaintiff's persistent questioning of PipeVine officials led PipeVine employees to formally accuse him of creating a "hostile environment." Chen Decl. ¶ 10.

1 In 2005, PipeVine collapsed and closed its doors, leaving millions of dollars unaccounted
2 for. This disaster caused heavy losses for charitable agencies that relied on UWBA and triggered
3 significant lawsuits, some of which are still pending. Chen Decl. ¶ 11. The PipeVine employees
4 who accused Mr. Chen of creating a “hostile environment” were significantly involved in these
5 losses. Chen Decl. ¶ 11.

6 Plaintiff’s opposition to improper financial reporting in 2006 created overt hostility from
7 other management. Plaintiff was threatened with termination when he maintained—correctly—
8 that the Director of UWBA was misreporting funds received from SBC Corporation. Chen Decl. ¶
9 12. His superiors were similarly hostile to his questioning of whether funds raised by Chevron
10 Corporation—UWBA’s biggest single source of funding—were significantly exaggerated. Chen
11 Decl. ¶ 12. He had previously raised the same question with respect to Clorox and had
12 demonstrated the UWBA’s reporting in that case was grossly exaggerated. His superiors were
13 openly hostile to his questioning of whether payments to Union officials who did no work for
14 UWBA were proper. Chen Decl. ¶ 12.

15 In August, 2006, Plaintiff returned from a vacation to find that he was suspended and
16 required to leave the premises. Compl. ¶ 16. He was subsequently terminated for creating a
17 “hostile work environment” in which “people were intimidated.” Compl. ¶ 16. He was never
18 informed of the specific actions he was accused of which supposedly created the “hostile work
19 environment.” Compl. ¶ 16. He was instructed not to contact staff or Board members. Compl. ¶
20 16.

21 **II. ARGUMENT**

22 **A. California Law Controls the Issue of Whether there is an Enforceable** 23 **Agreement to Arbitrate.**

24 The Federal Arbitration Act provides, in relevant part, that arbitration agreements “shall be
25 valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the
26 revocation of any contract. 9 USC § 2. This means that state contract law governs the issue of
27 whether grounds exist at law or in equity for refusing to enforce the purported agreement to
28 arbitrate. As the Ninth Circuit stated in *Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir.

2002) 298 F.3d 778, 782 “In determining the validity of an agreement to arbitrate, federal courts should apply ordinary state-law principles that govern the formation of contracts. Thus, generally applicable defenses, such as unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 of the FAA.” *Citing and Quoting First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944 and *Doctor’s Assocs., Inc. v. Casarotto*, (1996) 517 U.S. 681, 687 (citations, quotation marks, brackets and ellipses omitted).

B. Under California Law, the Agreement is Substantively and Procedurally Unconscionable.

1. The Agreement is Substantively Unconscionable.

The agreement in question is both substantively and procedurally unconscionable. Substantively, it is far more one-sided than agreements found unconscionable by California courts. The agreement provides that Mr. Chen agrees that “any dispute you may have” will be subject to arbitration. UWBA’s claims are not subject to the same provisions. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 118, the California Supreme Court ruled that it is “unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness . . .”

The agreement further provides that Mr. Chen’s statute of limitations for any claims he may want to make is truncated to “six months of the first occurrence of the events giving rise to the dispute.” Claims by UWBA are not subject to the same truncated statute of limitations. *Martinez v. Master Protection Corporation* (2004) 118 Cal.App. 4th 107, 117 (Arbitration agreement which required “the assertion of all statutory and common law claims covered by the agreement within six months of the date when the claim arises constitutes an unlawful attempt by [the employer] to restrict its employees’ statutory rights.”).

The Labor Arbitration Rules incorporated into the agreement do not allow for discovery. The *Armendariz* court ruled that employees “are at least entitled to discovery sufficient to adequately arbitrate their statutory claim” 24 Cal. 4th at p. 104. Moreover, as with other provisions, this provision is completely one-sided, applying to the claims Plaintiff may have, but

1 not applying to claims that Defendant may have.¹

2 The agreement imposes costs on the employee which he would not have were the case in
3 court. *Armendariz* holds that “when an employer imposes mandatory arbitration as a condition of
4 employment, the arbitration agreement or arbitration process cannot generally require the
5 employee to bear any *type* of expense that the employee would not be required to bear if he or she
6 were free to bring the action in court.” 24 Cal. 4th at p. 110-111.

7 2. The Agreement is Procedurally Unconscionable.

8 The agreement is as procedurally unconscionable as it is substantively unconscionable. It
9 was presented to Mr. Chen as part of his “package” of documents to sign on his first day of
10 employment. The agreement was a form agreement, used, at that time for all new hires. With
11 respect to the arbitration provision, Mr. Chen had two choices: Agree to it or leave. The
12 arbitration agreement referred to provisions of the American Arbitration Association Labor
13 Arbitration Rules, but did not attach them. These facts establish procedural unconscionability.
14 *Nyulassy v. Lockheed Martin Corporation* (2004) 120 Cal. App. 4th 1267, 1284 (Agreement
15 unconscionable, in part because the agreement was “a standard form utilized by defendant at the
16 time for the hiring of its employees.”). *Nagrapma v. Mailcoups, Inc.* (9th Cir. 2006) 469 F.3d
17 1257, 1282 (“An arbitration agreement that is an essential part of a ‘take it or leave it’ employment

18
19 ¹ UWBA may claim that these provisions apply equally to all claims, relying on the introductory
20 language stating that “United Way agrees, and by signing this letter you also agree, that binding
21 arbitration before a neutral arbitrator, rather than court litigation, shall be the sole method for
22 resolving disputes.” Exh. B to McConnell Declaration. This would be an attempt to re-write the
23 agreement after the fact to avoid the consequences. The provisions eliminating discovery,
24 truncating the statute of limitations other provisions clearly apply to “any and all disputes or
25 controversies that you may have which arise out of, or as a result of employment hereunder.” The
26 truncated statute of limitations requires that “the Arbitration must be initiated by your notice to
27 The United Way within six months of the first occurrence of the events giving rise to the dispute.”
28 Moreover, UWBA asserted a claim against Mr. Chen for return of a laptop computer, which he
allegedly had not returned, threatening in a letter dated May 7, 2007, to “assert claims against Mr.
Chen for their return and resulting damages.” Exhibit A to the Declaration of William Gaus in
Opposition to Petition to Compel Arbitration (“Gaus Decl.”). Mr. Chen was terminated in August,
2006. There has been a failed effort by Mr. Chen to arrange a return of his property held by
UWBA simultaneous with his return of the laptops in October, 2006. Exhibit B to Gaus Decl.
UWBA’s threat in May of 2007, to bring action against Mr. Chen obviously reflects UWBA’s
belief that their claim was not subject to the requirement that it must be brought “within six
months of the first occurrence of the events giving rise to the dispute.”

condition, without more, is procedurally unconscionable.”) (*quoting Mercurio v. Superior Court*, 96 Cal.App. 4th 167, 174).

Moreover, UWBA’s reference to selected rules of the American Arbitration Association Labor Arbitration Rules without attaching them, by itself, satisfied the requirement of procedural unconscionability. *Harper v. Ultimo* (2003) 113 Cal.App. 4th 1402, 1406 (procedural unconscionability because the party agreeing to arbitration “is forced to go to another source to find out the full import of what he or she is about to sign-and must go to that effort *prior* to signing.” (Emphasis in the original); *Dunham v. Environmental Chemical Corporation* (N.D. Cal. 2006) 2006 WL 2374703, slip. Op. at p. 10 (Agreement procedurally unconscionable because “though the AAA rules were referenced in the Arbitration Agreement, the rules themselves were never provided to Dunham.”).

C. **Defendant Ignores California Law and the Facts**

1. **Defendant Ignores and Misstates the Law and the Facts on Procedural Unconscionability**

a. **Defendant’s reliance on Plaintiff’s executive status ignores the law**

Defendant argues that there is no procedural unconscionability because “[b]efore joining United Way, plaintiff, according to his own resume, was a seasoned high-level executive who had been responsible for multi-million dollar turnarounds at two companies; negotiated 2.5 million credit facilities, major cost reductions from suppliers with no loss in service, and international sources of supply to support sales growth and run finance and administrative departments, including creating and implementing their policies and hiring staff.” Memorandum in Support Motion (“Def. Mem.”) p. 10. The California courts have squarely rejected the proposition that a person’s wide business experience and skills defeat a claim of procedural unconscionability. In *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App. 4th 638, 662, the court rejected “plaintiff’s status as a person of ‘substantial renown’ in his profession as proof of his equal bargaining power.” The court noted that in *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 812, the contract was found to be adhesive “even though plaintiff was a successful and sophisticated corporate executive. The suggestion that a contract or clause cannot be

unconscionable if it is accepted by a knowledgeable party has been rejected by our Supreme Court.” 115 Cal.App.4th at p. 662-663, *quoting Graham v. Scissor-Tail, supra* and *Stirlen v. Supercits, Inc.* (1997) 51 Cal.App. 4th 1519, 1534 (Citations and internal quotation marks omitted.). *Nagrampa v. Mailcoups, Inc.* (2006) 469 F.3d 1257, 1283 (*en banc*) (“[T]he sophistication of a party alone, cannot defeat a procedural unconscionability claim.”).

b. Defendant’s reliance on Plaintiff’s supposed ability to negotiate other terms ignores the law.

In the same vein, UWBA points to the fact that, included in its form agreement was boilerplate language stating “If you believe other promises have been made previously, tell us about them before you sign and, if we agree, we will include them.” Def. Mem., pp. 9-10. UWBA argues that “the agreement even advised plaintiff to seek the advice of an attorney before accepting it.” Def. Mem., p. 10. California courts have rejected far stronger arguments, deciding that, even where a plaintiff has negotiated other issues successfully, “Plaintiff’s ability to negotiate other aspects of his employment with Juniper has no bearing on the question of whether he had power to negotiate the *arbitration* provision.” *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App. 4th 638, 662 (Emphasis in the original); *Nyulassy v. Lockheed Martin Corporation* (2004) 120 Cal.App. 4th 1267, 1285 (Fact that plaintiff was represented by counsel and successfully negotiated a three-year ‘good cause’ provision in his contract did not defeat a finding of procedural unconscionability, citing and quoting the passage from *Abramson* quoted above.) If actual representation by counsel and actual negotiation over other terms has “no bearing” on the issue of procedural unconscionability, then hypothetical negotiations with hypothetical advice from counsel over unspecified “other provisions” as suggested by self-serving boilerplate have no bearing.

c. Defendant misstates the law and the facts with respect to procedural unconscionability.

Defendants also claim that procedural unconscionability “requires an inequality in bargaining power *accompanied by* lack of disclosure of material provisions.” Def. Mem. p. 11 (Emphasis supplied by defendant). Although the defendant quotes a California case, the statement

1 is not an accurate statement of the law. “In assessing procedural unconscionability, the relevant
 2 factors are oppression and surprise.” *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.
 3 4th 638, 662. The court in *Abramson* noted that “surprise is not a necessary predicate to a finding
 4 of procedural unconscionability,” citing five California cases in support.² In addition to *Abramson*
 5 and the five cases it cites, the case of *Fitz v. NCR Corporation* (2004) 118 Cal. App. 4th 702, 722
 6 ruled that “Even if a party is aware of some of the contractual terms, procedural unconscionability
 7 may still be found. When a contract is oppressive, awareness of its terms does not preclude a
 8 finding that the arbitration agreement is unenforceable.”

9 Moreover, even if surprise were an essential ingredient of procedural unconscionability, it
 10 is present here. As we have shown, UWBA’s arbitration provision referred to selected provisions
 11 of AAA Labor Arbitration Rules, which it did not attach (Chen Decl. ¶6).. This reference to these
 12 rules meant that, although it could not be discerned from the face of the document, the party
 13 signing it was waiving *all* discovery. As applied to the instant case, this would mean that UWBA
 14 could fire Mr. Chen, accusing him of the type of misconduct that would make him a questionable
 15 candidate for future executive positions, tell him nothing about the specific accusations against
 16 him and, if he challenged this action, he would learn who accused him and what these persons said
 17 for the first time at the hearing on his claim.

18 In short, UWBA’s arguments with respect to procedural unconscionability ignore the facts
 19 and mislead the Court with respect to the controlling law.

20 **2. Defendant Ignores the Facts with Respect to Substantive** 21 **Unconscionability.**

22 UWBA does not bother to discuss the factors that lead to a conclusion of substantive
 23 unconscionability, confining itself to the self-serving observation that “There is nothing
 24 ‘shockingly unconscionable’ about an agreement to arbitrate disputes with an employer.” Def.
 25 Mem., p. 11. As we have shown, however, it is unconscionable to have a clause where the claims

26 ² *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App. 4th 1322, 1330; *McManus v.*
 27 *CIBC World Markets Corp.* (2003) 109 Cal.App. 4th 76, 91; *Mercuro v. Superior Court* (2002) 96
 28 Cal.App. 4th 167, 174-175; *Blake v. Ecker* (2001) 93 Cal.App. 4th 728, 742 overruled on other
 grounds, *Le Francois v. Goel* (2005) 35 Cal. 4th 1094; *O’Hare v. Municipal Resource Consultants*
 (2003) 107 Cal.App. 4th 267, 282.

1 of the employee are subject to arbitration, but not the employer. It is unconscionable for all of the
 2 employee's claims to be subject to a truncated statute of limitations, while none of the employer's
 3 claims are. It is unconscionable for the employee's claims—but not the employer's—to be subject
 4 to a procedure where there is no discovery. It is unconscionable for the employee to be subjected
 5 to additional costs that he or she would not have if the claim were brought in court. Defendant's
 6 argument boils down to the assertion that these clauses do not shock UWBA's conscience, no
 7 matter what controlling California cases may say. Fortunately, UWBA's conscience is not the
 8 standard.

9 3. Defendant Misstates the Holding of *Boghos* and Other Cases

10 UWBA implies that one-sided provisions such as lack of discovery that applies only to the
 11 employee's claims or the truncated statute of limitations that applies only to the employee's claims
 12 are irrelevant to the issue of unconscionability. This is misinformation. Any arbitration
 13 agreement is unconscionable if it is one-sided. As the Ninth Circuit has observed "An arbitration
 14 provision is substantively unconscionable if it is overly harsh or generates one sided results. The
 15 paramount consideration in assessing conscionability is mutuality. California law requires an
 16 arbitration agreement to have a modicum of bilaterality, and arbitration provisions that are unfairly
 17 one-sided are substantively unconscionable." *Nagrampa v. Mailcoups, Inc.* (2006) 469 F.3d 1257,
 18 1280-1281 (*en banc*) quoting *Armendariz, supra*, 24 Cal.4th at p. 114; 117; *Abramson, supra* 115
 19 Cal.App. 4th at p. 657 and *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071. "An arbitration
 20 agreement is substantively unconscionable if it requires the employee but not the employer to
 21 arbitrate claims." *Martinez v. Master Protection Corporation* (2004) 118 Cal.App. 4th 107, 114,
 22 quoting *Armendariz, supra* 24 Cal.4th at pp. 115-121. (Citations, quotation marks and brackets
 23 omitted.)

24 Ignoring this law, UWBA argues that its one-sided provisions are of no consequence
 25 because—according to Defendant--these considerations were discussed in the *Armendariz* case
 26 and, according to UWBA "The *Armendariz* protections . . . apply only to a narrow range of
 27 claims—founded on statute or public policy—and do not extend to common law claims such as
 28

libel.” Def. Mem., p. 12. According to Defendant, the California Supreme Court has ruled “that *Armendariz* has *not* been applied to common law claims generally. Def. Mem. p. 13, *purportedly* quoting *Boghos v. Certain Underwriters at Lloyd’s of London* (2005) 36 Cal.4th 495, 506 (Emphasis in the original). This is a significantly misleading statement of the law for two reasons. First, *Armendariz* established special standards for relief from extra costs or expenses applicable to a class of employment cases. In *Boghos v. Certain Underwriters at Lloyd’s of London* (2005) 36 Cal.4th 495 the California Supreme Court declined to extend the *Armendariz* ruling “to insurance disputes and to declare the [insurance] policy’s arbitration clause unenforceable because it requires him to share with the Underwriters the costs of arbitration and the arbitrator’s fees.” 36 Cal. 4th at p. 507. The *Boghos* court noted “we have not extended the *Armendariz/Little* cost-shifting rule to common law claims generally.” 36 Cal.4th at p. 507. Defendant’s use of a fragment of this passage to state “The *Boghos* court further held that *Armendariz* has *not* been extended to ‘common law claims generally.’” Def. Mem. at p. 13. (Emphasis in the original) misleads, rather than informs.

Moreover, Defendant is equally misleading in claiming that *Boghos* and other cases have drawn a tight ring around a “narrow range of claims” where employees get the full benefit of the *Armendariz* opinion, including the cost-shifting provisions, leaving it open season on employees for all other claims. In Defendant’s view, an employer could get its employees to agree that the employer could commit a wide range of intentional, malicious torts and the employee could, by agreement, be limited to a truncated statute of limitations, denied all discovery, and potentially face greatly increased costs, so long as the employer did not include FEHA claims or claims of termination in violation of public policy. No California case that we are aware of has ever put forward such a palpably unjust rule.

The distinction drawn between *Boghos* on the one hand, and *Armendariz/Little* on the other is not between “statutory” and “non-statutory” claims, it is between waivable and non-waivable claims. *Boghos, supra*, 36 Cal.4th 495, 506 (“Through the FEHA, we reasoned, the Legislature created substantive and procedural rights not just for the benefit of individuals but also for public

purposes; accordingly, those statutory rights are unwaivable under Civil Code sections 1668 and 3513.” (Footnotes omitted)). The lower appellate court cases cited by Defendant make the same distinction. *Independent Ass’n of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal.App. 4th 396, 415 (*Armendariz* potentially applicable if franchisees’ claims involved rights “deemed to be unwaivable under Civil Code sections 1668 and 3513.”); *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App. 4th 1276, 1288 (*Armendariz* applies for “statutory rights [which] are unwaivable under Civil Code section 1668 and 3513.”), not to “‘garden variety’ breach of contract action”; *Parker v. McCaw* (2005) 125 Cal.App. 4th 1494, 1497 (Attorney negotiated an agreement with a person to whom he served as “financial advisor, lawyer, counselor, good friend and intimate partner.” *Armendariz* held inapplicable because the agreement he negotiated was “not a ‘generic’ or standard agreement.”). Defendant’s assertion that these cases draw a bright line with FEHA and *Tameny* claims on one side and all other claims on the other is simply more misinformation about the applicable law.

The reason the courts look to the issue of whether a claim is waivable is that, if a claim cannot be waived by contract, it should not be possible to hamstring the claim by contract, such as by creating special costs that discourage the individual from bringing the claim. Applying the most commonly-articulated standard for when the *Armendariz* cost-shifting standards might apply, it is clear that a claim for libel would not be “waivable under Civil Code Sections 1668 and 3513.” Civil Code § 1668 provides, in pertinent part, that a person may not enforce contracts waiving liability for “willful injury to the person or property of another” Mr. Chen’s claim of libel requires a showing of malice on the part of UWBA Cal. Civ. Code § 47(c).

4. In Arguing Severability, Defendant Ignores California Law

Even if UWBA were correct in its view that a claim of libel, by itself, could be subject to arbitration under a clause such as the one at issue here, they ignore the fact that the arbitration clause at issue here is so clearly unenforceable with respect to the claim of termination in violation of public policy that even UWBA cannot see an argument for its enforcement. UWBA informs the Court that, in this situation, the law requires that the unenforceable clause be enforced with respect to some claims and not others. This is not the law.

1 California Civil Code provides that where a contractual provision is unconscionable, “the
2 court may refuse to enforce the contract, or it may enforce the remainder of the contract without
3 the unconscionable clause, or it may so limit the application of any unconscionable clause as to
4 avoid any unconscionable result.” Cal. Civ. Code § 1670.5. Thus, the Court has discretion, but
5 there are guidelines. Borrowing from the factors that guide a court in deciding whether to
6 completely invalidate or partially enforce an illegal contract, the California Supreme Court ruled
7 that, in the case of an unconscionable arbitration contract, the contract should not be enforced
8 where there are “multiple defects [which] indicate a systematic effort to impose arbitration on an
9 employee not simply as an alternative to litigation, but as an inferior forum that works to the
10 employer’s advantage.” *Armendariz, supra*, 24 Cal.4th at p. 124. California cases have applied
11 this rule to invalidate unenforceable arbitration agreements that would have included both
12 statutory and non-statutory claims. *Abramson, supra*, at 115 Cal.App. 638, 644 (claims for breach
13 of contract, fraud, misrepresentation, termination of employment in violation of public policy,
14 unfair competition and defamation. No severance because severance would “produce, rather than
15 prevent undeserved benefit and detriment.” 115 Cal.App. 4th at p. 667; *Harper v. Ultimo*, (2003)
16 113 Cal.App. 4th 1402 (approving “trial court’s refusal to sever arbitral from nonarbitral claims”
17 noting that the claims “were all bound up with each other.” 113 Cal.App. 4th at p. 1411; *Nyulassy*
18 *v. Lockheed Martin Corporation* (2004) 120 Cal. App. 4th 1267, 1287-1288 (Action for breach of
19 contract, breach of the covenant of good faith and fair dealing, wrongful demotion in violation of
20 public policy and violation of section 6310 of the Labor Code. Arbitration agreement not enforced
21 because it was “substantively unconscionable because it lacks any degree of mutuality, imposes
22 upon plaintiff a prearbitration resolution procedure controlled by defendant, and severely limits
23 the time within which plaintiff may demand arbitration to vindicate his rights.”

24 This case provides a textbook example of a situation where severance would allow a party
25 to get the benefit of its unconscionable provision. UWBA would be able to defend the claim of
26 libel in a proceeding where Mr. Chen would learn of the evidence against him and have the
27 opportunity to respond for the first time at the hearing. Mr. Chen would have no access to the
28 wealth of documentation showing UWBA’s cavalier attitude toward PipeVine’s deficiencies and

its own misfeasance in financial matters. He would have no access to the documentation showing how he insisted on proper standards and how his superiors resented him for it. Armed with this enormous advantage, UWBA would seek a decision either that the statements they made concerning Mr. Chen were true or that they made the statements out of a good-faith belief that they were true, rather than out of malicious resentment of Mr. Chen's insistence on proper financial reporting and management. They could then argue that whatever favorable findings they had secured in this monumentally unfair proceeding should preclude relitigation of the same issue in the court case. This scenario would reward "a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Armendariz, supra*, 24 Cal. 4th at p. 124.

Even if there were no issue preclusion, there would be a risk of inconsistent adjudications. In *Harper v. Ultimo* (2003) 113 Cal.App. 4th 1402, 1411, the court approved a refusal to sever based, in part, on the fact that "We could have the anomaly that the arbitrator might award little or no contract damages, find that Ultimo made no misrepresentations and fulfilled his contract, and the jury might find he did commit fraud, and try to assess punitive damages based on (perhaps hypothetical, perhaps not) compensatory damages inconsistent with the arbitrator's award of compensatory. In short, it would be a mess."

III. CONCLUSION

For the reasons set forth above, Defendant's Petition to Compel Arbitration should be denied.

Respectfully submitted

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